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No. 366

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

UNITED STATES OF AMERICA, APPELLANT

v.

HENRY PRESTON COVINGTON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

BRIEF OF APPELLEE

WILLIAM J. DAVIS
ATTORNEY FOR APPELLEE
855 EAST LONG STREET
COLUMBUS, OHIO

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A. This tax statute requires the acquisition of order forms and the prepayment of the transfer tax by non-registrants.

B. The tax compels self incrimination in violation of the Fifth Amendment to the U.S. Constitution.

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Cases:
U. S. vs Covington 282 F Supp 880
Marchetti vs United States 390 U. S. 39
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18 U.S.C. 3731
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BRIEF FOR THE APPELLEE

Opinions Below

As indicated in appellants brief, the District Courts opinion dismissing the indictment is reported in 282 F. Supp 886 and the Courts opinion denying reconsideration is unreported but is set forth in the Appendix to appellants brief (R.20).

JURISDICTION

The Goverment maintains that jurisdiction of the Court rests on 18 U.S.C. 3731, which authorized the goverment to take a direct appeal from a decision sustaining a plea in bar and from a dismissal of an indictment based on construction of the statute on which the indictment is founded.

QUESTIONS PRESENTED

Whether the Fifth Amendment to the U.S. Constitution bars prosecution and conviction under 26 U.S.C. 4744 (a) (1).

STATEMENT

Appellee was charged in a one court indictment with violating 26 (U.S.C. 4744 (a) (1), by obtaining 737.1 grams of marihuana without having paid the transfer tax imposed by 26 U.S.C. 4741 (a). Appellee moved to dismiss the indictment on the grounds set forth in Marchetti v. United States, 390 U.S. 39, Grosso v. United States, 390 U.S. 62 and Haynes v. United States, 390 U.S. 85. The motion was sustained by the District Court on the grounds that appellee's privilege against self-incrimination was a complete defense to the prosecution.

The government moved for reconsideration on the grounds that the act as administratively construed did not compel incriminating disclosures. The Court ruled in thealternative that if appellee could not pay the tax, there was no basis for the indictment.

SUMMARY OF ARGUMENT

Chapter 39 of the Internal Revnue Code is entitled "Regulatory Taxes and Subchapter A, entitled "Narcotic Drugs and Marihuana is divided into three parts one being Part II entitled "Marihuana, and running from 26 U.S.C. 4741 to 26 U.S.C. 4762, and Part III being a general section (26 U.S.C. 4771 to 26 U.S.C. 4776) relating to narcotic and marihuana. The defendant bases his motion on a series of cases reported in 360 United States Reports. The cases in question are Marchetti v. United States, 390 U.S. 39, Grosso v. United States, 390 U.S. 62, and Haynes v. United States, 390 U.S. 85. A careful reading of these cases indicates that they specifically overrule United States v. Kahriger 97 L ed 754 and Lewis v. United States 99 L ed 475 and as aptly stated by Chief Justice Warren in his dissent to Grosso v. U.S., these cases open the door for "new wave of attacks on a number of Federal registration statutes wherever the registration requirement touches upon allegedly illegal activities", See Grosso v. U.S., 390 U.S. 62. It is interesting to note that it was the opinion of the Chief Justice in his dissent that these three cases also affected the requirements for registration as to dealers in marihuana.

The defendant in the present case is charged with being the transferee of marihuana and with failing to pay the tax required by Title 26 U.S.C. Sec 4741 (a), said failure being a violation of 26 U.S.C. 4744 (a) (1). It follows from a careful reading of Haynes v. U.S., Grosso v. U.S. and Marchetti v. U.S. that the particular tax scheme on which the defendant faces the Court bears a substantial and close relation to the schemes involved in these three cases and especially in the Haynes case, since in the present case the defendant would be required to register as the transferee of contraband g[illegible], to wit marihuana, which is a contraband punishable for possession under the laws of the State of Ohio. The nature of the information required by the statute is evidenced by the Notice and Demand served on the defendant by Narcotic Agent Jack L. Lloyd dated August 11, 1967, which would require the defendant to produce a copy of an offical order

form as required under Section 4742 of Internal Revenue Code indicating the transfer of marihuana. Since marihuana is contraband goods and is punishable in its possession both under the United States Code and under the statute of the State of Ohio, the information requested, the registration requested and the whole tax scheme is incriminatory, and we can only assume that here is a clear Governmental scheme to gather evidence from citizens in order to secure their conviction of frimes. This contravenes the privilege of the Fifth Amendment to the United States Constitution. See Albertson v. Subversive Activities Control Board.

Since the tax scheme invisioned by 26 U.S.C. 4741 (a) as applied to the defendant uhder this ifdictment with reference to violation of 26 U.S.C. 4744 (a) (1) involves a compulsory legal scheme requiring the defendant to admit that he is indulging in illegal activities which violate the laws of the United States and the laws of the State of Ohio (See Ohio Revised Code 3719.09), it is the contention of the defendant that said law is in violation of his privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution. It follows that under the recent case law enunciated by the Court (Marchetti, Grosso and Haynes) the opinion of the District Court ought to be sustained.

As the government contentions that the tax statute has been construed administratively to preclude the acquisition of order forms and prepayment of the transfer tax by non-registrants and as so construed does not contemplate or compel self-incrimination, the District Court on the motion to reconsider gave an excellent answer to this devious argument. As follows:

" The memorandum filed in support of this motion submits that a person who is a transferee of marihuana in violation of state laws will not be issued an order form for marihuana. It is asserted that this rids the statute of any trace of unconstitutionality. This Court did not decide that the marihuana taxing provisions are in themselves unconstitutional; it merely determined that, as applied to this defendant, they would be unconstitutional."

" If defendant had no obligation to pay the tax and obtain an order form, the United States had no basis on which to seek an indictment. The Court does not agree that Section 4744 (the statute under which defendant was indicted) is now an absolute prohibition. Section 4744 is based explicitly on Section 4741 (a). If 4741 (a) is not applicable to defendant, then there is no basis for the indictment."

CONCLUSION

For the reasons stated above, the judgment below dismissing the indictment should be sustained.

Respectfully submitted.

William J. Davis
Attorney at Law